# CASES

ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF THE

# STATE OF LOUISIANA.

East'n District. *March*, 1824.

## EASTERN DISTRICT, MARCH TERM, 1824.

*CASSIOT* vs. *GICQUEL.*

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APPEAL from the court of the parish and city of New Orleans.

A minor, above the age of puberty, must be assisted, in his suit, by a curator.

If he be not, the circumstance may, on the appeal, be assigned as an error, apparent on the face of the record.

PORTER, J. delivered the opinion of the court. The defendant and appellant assigns as error, appearing on the face of the record, that the plaintiff, who is stated in the petition to be a minor, above the age of puberty, was not assisted by a curator *ad lites.*

We think the objection well taken. The petition states that the suit is brought with the

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PORTER, J. delivered the opinion of the court. The defendant and appellant assigns as error, appearing on the face of the record, that the plaintiff, who is stated in the petition to be a minor, above the age of puberty, was not assisted by a curator *ad lites.*

We think the objection well taken. The petition states that the suit is brought with the

advice and consent of one Annette Laine, a *f. w. c.* and that the minor is assisted by her; but it contains no allegation that she has the quality which the law requires, in those who represent minors in courts of justice. The proceedings are therefore irregular, for want of proper parties, and must be set aside. *Civil Code*, 72 & 74, *art.* 80 & 81.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided, and reversed, and that there be judgment against the plaintiff, as in case of nonsuit, and that Annette Laine, a *f. w. c.* by whom this action was instituted, and who is a party to the record, pay the cost of this court.

*Rodriguez* for the defendant, *Appé* for the plaintiff.

*ESHOM* vs. *LAMB & AL.*

Bail may be demanded, in a supplemental petition.

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court. The plaintiff charges, that the defendant, Lamb, is indebted to him for work and labour on a bridge, which the latter undertook

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to build for the police jury of Feliciana—that there is a sum of money, due by the police jury to Lamb, and he has a lien on the bridge for his payment—that the defendant, M'Caleb, is the treasurer of the police jury—judgment is prayed against the defendant, Lamb, and that the other defendant be directed to retain the sum to be decreed out of the monies due to the defendant, Lamb, by the police jury, and pay it to the plaintiff.

Lamb pleaded the general issue, and payment.

M'Caleb denied that the petition shewed any cause of action against him—urged that as the proceedings are by citation, & not attachment, he could not be called in as a garnishee—that he has no interest in the suit. He denied every allegation which related to him.

The plaintiff filed a supplemental petition, praying that Lamb might be held to bail. This was accordingly done.

The district court, however, discharged Lamb, on the ground that he was held to bail on a supplemental petition. The plaintiff appealed.

In addition to the ground, on which the appellee's discharge was obtained, his counsel

shews that, if the proceedings against the defendant, M'Caleb, be valid, the subsequent arrest of the appellee was irregular—by making M'Caleb a party, the plaintiff has hung up the defendant's funds in his hands, and the posterior arrest is unnecessarily injurious and oppressive.

We supported, in the case of *Vidal vs. Thompson*, 11 *Martin*, 23, the decision of the judge of the fourth district, who had declined discharging Thompson on the ground, on which the present appellee obtained his; and we did not then see any difference there, in praying for bail, in an original, or a supplemental petition; and we are not now able to discover any.

M'Caleb has denied that he has any funds, on which the appellee has any claim, and the appellee has not averred that there is, nor made this a ground of his application in the district court.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the case remanded, to be proceeded on, according

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to law. The costs of the appeal to be paid by the appellee.

*Watts* and *Lobdell* for the plaintiff, *Woodruff* for the defendant.

*ACCINELLI* vs. *SYNDICS OF MENARD.*

A mortgagee has a right to require the syndics to sell for cash.

It suffices that the mortgage be recorded before the cession, to be binding on the creditors.

APPEAL from the court of the parish and city of New-Orleans.

MATHEWS, J. delivered the opinion of the court. In this case, the evidence shews, that the appellee had sold, through the agency of an attorney in fact, certain negroes to the insolvent, previous to his bankruptcy, for a price stipulated by the parties, in their contract of sale, which was not yet due, at the time of the failure and cession of property by said insolvent.

In the act of sale, a conventional mortgage was retained on the slaves, to secure the payment of the price, as evidenced by notes marked *ne varietur*.

This mortgage was recorded before the *cessio bonorum*, made by the bankrupt, &c.

The syndics, having advertised the negroes, now in question, for sale, on terms of credit, the vendor to the insolvent opposed a sale by

them in that manner, and insisted on his right, as mortgage creditor, and privilege as seller, to have them sold for cash. This was finally ordered by the court below; and from that decree, the syndics appealed.

The act of 1817, secures the right and privilege, claimed by the appellee in this case, to all mortgage creditors. But the counsel for the syndics, insists, that the preference and privilege on the property sold, had been lost, in consequence of the negligence of the seller, in not causing the act of sale to be recorded in the office of the register of mortgages, conformably to the provisions of the law of 1813, made for such cases. This would, perhaps, be true, if the appellee's pretentions rested solely on his privilege as vendor, without any stipulation of a conventional mortgage. As such mortgage had been agreed on, and as it was recorded before the cession of goods by the insolvent, we are of opinion, that the privilege of the mortgagee exists in full force against the appellants, and that his right to require the sale of the slaves hypothecated, to be made for ready money, is in no manner lost or impaired. The circumstance of the period of credit not having expired, at the time of the

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failure of the purchaser, does not alter the situation of the parties; for, by that occurrence, all his debts became due, and due according to their ranks and privileges.

The ground of opposition, which the counsel for the appellants attempts to hold against the right and privilege claimed by the appellee, as supported by the negligence of the latter, in not causing his mortgage to be recorded three months previous to the surrender of property by the insolvent, appears to us, to be wholy untenable. According to express provision of law, a mortgage, though not recorded within the time prescribed, so as to give it effect against third persons, from the date of the instrument; has, nevertheless, its full force and effect against such persons, from the date of its registry. In the present case, the creditors *en masse*, who are represented by the syndics, acquired no right to the property of the insolvent, until after the *cessio bonorum*, and the recording of the mortgage, now under discussion, took place long before. It had effect against them, (even if we allow them to be third persons in the sense intended by law) in July: the cession of goods was not made until September following.

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It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be affirmed, with costs.

*Denis* for the plaintiff, *Seghers* for the defendant.

*LAFON'S EXECUTORS* vs. *PHILLIPS & AL.*

The purchaser of the land of an estate, under the directions of a court of probates, acquires it free from incumbrances.

Any irregularity in the sale, must be complained of, before the homologation of the curator's account.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The petitioners state, that in the year 1810, their testator instituted a suit against Madame Riviere, executrix of the late J. B. Riviere, in order to recover of her, the balance due for the building of a certain house, situated at the corners of Bienville and Levee streets, and that an action was commenced by the said Madame Riviere, against the said Lafon, for damages: which suits were consolidated, and a final judgment rendered thereon, on the 14th of April, 1823, for the sum of $3389 78 100—that the house, the building of which, occasioned these actions, is now in the possession, and is the property of the defendants, and being subject to the original privilege granted by law, to the builder, must be

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abandoned by them, and sold, in order to satisfy the judgment already stated, unless they prefer paying the debt, with interest and costs.

The answer, and exceptions, set up the following defence, to the demand:

1. That the authority of the plaintiffs has long since expired, and the suit should have been instituted in the name of the heirs.

2 The facts set forth, in the petition, are untrue.

3. From the records of the suits, to which the plaintiffs allude in their petition, it appears it was for the building of two houses, that Lafon contracted with Riviere, and not of one, and that recovery cannot be had, against the defendants, for the sum due for building a house that is now owned by another and third party.

4. Many years after the building of the houses already alluded to, Riviere became insolvent, and surrendered his property to his creditors: syndics were appointed according to law, and the property now claimed, was sold by them, and the proceeds arising from said sale, regularly paid over to the persons duly entitled to receive them, under a decree of the court. The widow of Riviere, his ex-

ecutrix, filed an account of her administration in the court of probates, when the same after the usual proceedings was duly homologated, and no opposition made thereto, by the petitioners. In consequence of which, it is averred they have lost their lien, and cannot sustain the present action.

5. The defendants were not parties to the judgment, and are not bound by it.

6. One thousand dollars more than the sum actually due the testator of the plaintiffs, was received from the negligence of the defendant, in the original suit, in not proving the handwriting of Lafon, to a receipt for that sum—and,

7. In the judgment referred to in the petition, costs are included, for which no lien exists on the building owned by them.

A supplemental answer was subsequently put in, which contained,

1. An allegation that the claim of the petitioners, was not a privileged one—and

2. If so, it was barred by prescription.

We have formed an opinion on one of these exceptions, which is the fourth in the order just stated, which renders it unnecessary to examine the rest. It was that on which the judge decided the cause in the court below,

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and in our opinion correctly. Before entering on the principal question which it presents, we have to notice a bill of exceptions, taken by the defendants, to the introduction of the documents offered by the plaintiffs in support of this part of the case. The grounds relied on here, in support of this objection, are, that by the answer, it is averred, that the property in question, was sold by the syndics, and that the evidence offered, shews it to have been disposed of by the executrix. On recurring to the answer, we find that it was incorrectly drawn up, without an exact knowledge of all the facts in the case; enough, however, is stated, to shew the judge decided correctly, in admitting in evidence, the papers objected to. The answer avers the insolvency of Riviere in his life time, subsequent to the building of these houses—that he surrendered them, with his other property, to his creditors, and that they were sold by his syndics. It goes on, however, to state, that the executrix filed also an account of her administration in the court of probates, which, after the usual proceedings being had, was duly approved and homologated—that by this account, the estate of the deceased appears to have been insolvent, and

that the plaintiffs, by suffering the accounts of the syndics and the executrix to be sanctioned by the court, without making opposition to either, had lost their lien on the property. Under this last branch of the answer, we think all the proceedings in the court of probates were legal evidence in the cause, and that if they furnish a proper defence to the action, we must give them effect.

This brings us to the principal question in the cause----the effect of the sale by the court of probates. It is contended by the defendants, that this sale freed the property from the mortgages existing on it, and that the creditor should have pursued his lien on the proceeds, in the hands of the executrix.

On reference to the provisions of our code, which point out the step to be pursued by executors, who are ordered by the will, to sell the property of the deceased, and pay his debts, we find that they are directed to proceed in the manner prescribed to the curators of vacant successions. It therefore follows, that if a sale by them, under the authority of the court of probates, would have the effect contended for in this case, the same consequence will ensue, as that made by an executor. *Civil Code*, 246, *art.* 174.

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According to the rules, established by the legislature, in relation to vacant estates, it is made the duty of the curator, immediately after the inventory is completed, to cause all the moveable and immoveable property to be publicly sold. This provision, of course, embraces that part of the estate on which mortgages or privileges exist; for, it speaks of *all* the property, without any exception. If, however, it stood alone without any thing else, which indicated the legislative will on the subject, it might be a matter of doubt whether the property so affected, was not to be sold, subject to the liens, which the owner before his decease, might have subjected it to. But a consideration of other provisions of the code, satisfies us, that such was not the intention of the lawmaker, and this we think clearly results, as well from a general view of the system which has been established in relation to the settlement of estates, as from the particular expressions of the law, which will be hereafter noticed.

We had occasion to enter very fully into the subject of the jurisdiction of the court of probates, in the case of *Vignaud* vs. *Tonnacourt*, which will be found reported in 12 *Martin*,

229, many of the reasons on which we came to the conclusion then, that the court of probates had exclusive jurisdiction of the estates of deceased persons and their settlement, will be found to have a strong bearing on the question now before us. It is evident that the legislature contemplated, and has provided, that claims against successions should be presented to one tribunal, and that, if there is not enough to pay all, they should be liquidated contradictorily by the different creditors, and their preference settled by the judge. We, therefore, concluded, in the case just mentioned, that different suits could not be instituted before tribunals other than the court in whom the power of making this settlement, was vested. This reason operates with great force to shew that the purchaser should take the property free from incumbrance, and the creditor be compelled to inforce his privilege, or mortgage, on the proceeds in the hands of the curator. For, in the contrary hypothesis then, as it is correctly stated in the opinion of the court below, the liquidation of a claim on the estate, and the payment of it, would not be made under the authority of the court of probates, and by the curator, but by the creditor,

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and a third party litigating their respective rights before another tribunal.

But there is a particular provision of the code, which we have already attended to, that we think places the correctness of the opinion we entertain, beyond doubt. We allude to the 137*th art. page* 178. It is there declared, that the curators of vacant estates, and absent heirs, shall not proceed to the payment of the debts, until they have previously obtained the authentication of the parish judge, by whom they have been appointed—that, that authentication shall be necessary, even in case there be money enough to discharge all claims on the estate; but should there not be sufficient property to satisfy all demands, it shall be their duty to cause the parish judge to regulate the classes of *privileges* and *mortgages*, and then to establish the rank in which the creditors shall receive their payment.

From the language here used, it results, that the privilege and mortgage creditors, may demand payment out of the proceeds of the sale, in the hands of the curator, and in preference to simple creditors. This preference could have been given, on no other ground, than that they would have had the same right

on the object from which these proceeds originated, or, in other words, that the money represented and stood in place of it. But if we consider, as is contended, the mortgage still to exist, there is no ground whatever, for conferring this advantage on the mortgagee; for the moneys in the hands of the curator, would only be the price that the object sold for, after deducting the sum for which it was hypothecated. Such a construction would lead to great injustice, when considered in another point of view. The creditors, who may enjoy a lien on the estate of the deceased, we have already seen, can claim payment from the curator, out of the proceeds coming from the sale of the property. Now, if in addition to this right, they also retain a lien on the object sold in the hands of a purchaser, then it follows, that they diminish the general fund, out of which, all the debts are to be paid in a sum exactly equal to the amount of their mortgages; as the buyer will, of course, not give more than the value of the thing, over and above the sum for which it is hypothecated—that out of this sum, so diminished, they have a right to be paid in preference to the chirographary creditors, and that the latter have no means of

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enforcing the lien, which occasions a total loss of their debt.

We forbear to pursue the subject through the variety of illustrations of which it is susceptible, and we conclude that independent of the result, which a consideration of our whole judicial system, in relation to successions leads to, the right given to mortgage and privilege creditors to be paid out of the proceeds of the sale of the property mortgaged, is totally inconsistent with allowing them to retain a mortgage in the thing sold.

The plaintiffs, however, contends that, admitting the general principle to be as just pronounced, yet, here the sale was irregular, as not being made after the usual advertisements, &c. On this point, we are of opinion that, if the irregularities did exist, the proper time and place to have objected to them was, in the court of probates, when the executrix applied for an homologation of her administration of the estate. The law requires the creditors to present their claims and enforce them before that tribunal. It makes them parties to the proceedings, by a public notice directed to be published in both languages, calling on them to make opposition, if they have any to make, and

it declares that if they do not present themselves, they shall thereafter be without any resource or remedy. *Civil Code*, 178, *art.* 138 & 139.

In opposition to the effect, which we think the proceedings in the probate court must necessarily have, we are reminded of a decree pronounced by this court in the case of *Lafon* vs. *Riviere*, when judgment was given against the principal debtor. But we do not see how the opinion then expressed at all affects the case. The decision of the court then was, that the defendant was too late in presenting his dilatory exception. Here the third possessors seek to protect themselves by shewing that from the nature of the proceedings, in the court of probates, the property was acquired free from any lien, and that the plaintiff was by law a party to the proceedings. If such was the fact, and we have seen that it was, then no subsequent consent of the executrix and the creditor to litigate the points in dispute between them coulddeprive the purchaser from holding the property on the condition he acquired it.

It is therefore ordered, adjudged and decreed that the judgmedt of the district court be affirmed with costs.

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*Hennen* for the plaintiffs, *Preston* for the defendants.

*AMES & AL. vs. REED.*

The master who does not deliver the goods, is accountable for the price.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. In this case the appellees claim reparation in damages to the amount of the value of certain books, which were received by the appellant on board the steam boat Feliciana, to be transported from New-Orleans to Plaquemine. They allege that said books (contained in a box,) were in good condition at the time they were received by the appellant; but that, in consequence of his negligence and misconduct, they were destroyed and lost.

The judgment of the court below is for the full value of such books, as are described in the petition, according to the rate at which they were invoiced to the subscribers for them in this country.

This judgment the counsel for the appellant contends, is erroneous. 1st. because the evidence shews the property to have been injured before it was received by his client; and

2nd. because the judge of the district court has estimated it *too* highly, admitting that the loss was occasioned by the neglect of the defendant.

It is true, that there appears something of mystery in the whole testimony, taken together, but we believe that it discloses facts, which justify the conclusion of the judge *a quo*, as to the liability of the appellant.

In what amount he ought to have been condemned, is a question of more difficulty. At what price or value ought those books to have been estimated, that of the actual expense of printing them, or the value put on them to subscribers, according to the invoiced price?

For a solution of this question, we are referred to the rules which govern in cases of insurance. On a valued policy, the insured, according to the general rule established in such cases, when the loss is total, is entitled to receive the whole sum insured. See *Marshall*, 618. In England when it becomes necessary to appreciate the loss of an open policy, the prime cost, that is, the invoiced price, forms the basis of the estimation. *Anthon's ed.* 622.

In the present case, considering the captain of the steam boat as an insurer for the value of

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the books, which are totally lost to the owners; the fundamental rule for appreciating such loss is given by the price as estimated in the invoice, which is at four dollars per volume, the same value, at which they are put to subscribers for the work. There is nothing shewn by the evidence of the cause to create an exception to the general rule, by which the court below seems to have been governed in its judgment.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

*M'Caleb* for the plaintiffs, *Pierce* for the defendant.

*SANDERS vs, HIGHLAND'S CURATRIX.*

A curatrix cannot be sued in the district court. But if she be, have judgment and the pff appeal, he shall pay costs, in both courts, as he committed the first error.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. This action was brought in the district court; the defendant, curatrix of her husband's estate, had judgment and the plaintiff appealed.

It is unnecessary to examine the case on the

merits—the action ought to have been brought before the court of probates—the district court had no jurisdiction.—*Vignaud* vs. *Tonancourt*, 12 *Martin*, 229.

Judgment was incorrectly given on the merits—the suit ought to have been dismissed. But in relieving the plaintiff, we think we cannot do so at the costs of the defendant, as the plaintiff committed the first error.

It is therefore ordered, adjudged and decreed that the judgment be annulled, avoided and reversed and that the plantiff's action be dismissed, he paying cost in both courts.

*Preston* for the plaintiff, ———, for defendant.

*MILLON vs. DELISLE.*

APPEAL from the court of the eighth district.

A judgment which does not contain the reasons on which it is founded, is contrary to the constitution.

When the suit is tried entirely on documents, this should be certified by the judge; and not by the clerk.

MARTIN, J. delivered the opinion of the court. The petitioner states that an agreement was entered into by which the plaintiff agreed to sell a certain tract of land to the defendant, for which the latter undertook to pay $1500, *i. e.* $500 on signing the agreement 200 three months thereafter, & $800 out of the

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produce of the first lime or lime-kiln made on the land—that there remains due $640 out of the last $800; the defendant having neglected to pay out of the first produce of the lime made there. The petition concluded that the defendant be cited to answer the plaintiff in an action of debt.

The defendant admitted the agreement, but averred the plaintiff had neglected to perform his part of it—he pleaded the general issue, payment and compensation, according to an amount annexed to the petition.

There was judgment for the plaintiff and the defendant appealed.

The appellant's answer shows that the judgment contains a reference to no law, nor any reason as the ground of the judgment—And that no judgment could be given on the petition as it contains no prayer for relief.

The want of any of the reasons, on which the judgment was given, is sufficient ground to reverse the judgment, as the constitution of this state imperiously requires the insertion of the reasons, on which the court acts.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed.

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Proceeding to inquire what judgment the court below ought to have given, we find that the evidence does not come up in a manner that may authorise us in examining the case on the merits.—The clerk has certified that the *documents* on which it was tried are in the transcript. This, the act of 1817 requires should be done by the *judge*. *Moulon* vs. *Brand's syndics*, 10 *Martin*, 669.

It is therefore ordered, adjudged and decreed that the case be remanded, with directions to the court to render judgment according to the provisions of the constitution—and it is further ordered, that the the plaintiff pay costs in this court.

*Hennen* for the plaintiff, *Preston* for the defendant.

*BARCKLEY, & AL.* vs. *EVANS' EX'RX.*

APPEAL from the court of the first district.

The judgment cannot exceed the sum claimed in the petition.

MATTHEWS, J. delivered the opinion of the court. This suit is brought on an account current of long standing, between the plaintiffs and the testator of the present defendant.

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The balance claimed by the former arises, principally from interest, calculated on the debit of said account, which, in the petition, is alledged to amount to 750 pounds, ten shillings and ten pence, sterling. The first difficulty which seems to have occurred in the discussion of the cause in the court below, related to the plaintiffs' right to calculate and charge interest during the period in which commercial intercourse was interrupted between the citizens of the U. States and the subjects of his Britanic Majesty, in consequence of the late war, &c.

This matter was referred to the counsel of the parties to the suit, who reported that the letters of the deceased, Mr. Evans, did authorise the charge of interest during the war. The same arbitrators also decided that interest ought not to be calculated on items compounded of principal and interest. When these points were settled, the account was referred to the deputy clerk of the district court, to make the calculation of interest in conformity thereto. His manner of calculation, having, in the first instance, produced an estimate which the counsel for the plaintiffs thought too low, he caused it to be set aside,

and had the account again submitted for further calculation, which resulted in producing the sum of *L*964 11*s.* 3*d.* sterling in favor of the plaintiffs, for which judgment was finally rendered against the defendant. From that judgment the present appeal is taken.

The counsel for the appellant objects to the legality of the judgment rendered by the district court on two grounds. 1st. It is erroneous because it exceeds the sum prayed for in the petition. 2nd. because the interest was not calculated justly, either in relation to the mode of calculation, or the period of time for which it was estimated.

We are clearly of opinion, that the judgment complained of is erroneous, so far as it exceeds in amount, the sum claimed by the plaintiffs in their petition. This matter appears to us, to have been fully discussed and settled by the decision of the court, as reported in 11 *Martin*, 289. On the first ground assumed by the appellant, the judgment of the court below would have to be reversed—and if the same objection to its correctness were without foundation, we might proceed to give judgment as it ought to have been given in the district court. As to the manner in which inter-

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est seems to have been calculated by the clerk to whom the account was referred, we are inclined to think it correct. But the time for which the estimate ought to have been made, is left in great doubt. The evidence of the case does not show that interest can be legally claimed for any other period, except the late war between the United States and Great Britain, and also, from the judicial demand in the present suit. It has, however, been calculated for a greater length of time, and the propriety of such calculation is supported by inference, alone, to be derived from the report of the referees on the subject of the interest claimed during the war. This, we think, is supplying *too* much of the evidence, by implication.

Upon the whole view which we have taken of the cause, it is our opinion, that justice requires it to be remanded for a new trial in the court below.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, that the cause be remanded to the court below for a new trial, and

that the appellees pay the costs of this appeal.

*Livingston* for the plaintiffs, *Hennen* for the defendant.

*SEAL vs. ERWIN & AL.*

APPEAL from the court of the fourth district.

If the defendant promised to deliver to the plaintiff, his overseer, a quantity of provisions for himself and family, they cannot be withholden till the end of the year.

It is not a fatal objection to his petition, claiming their value in money, that their value is not stated.

If A. propose to B. to take charge of his plantation as an overseer for a certain allowance, B's going on and ta ing charge of it, is evidence of his assent to the terms.

Nothing requires the defendant's answer to the plaintiff's interrogatories to be inserted in the answer to the petition.

MARTIN, J. delivered the opinion of the court. The plaintiff claims $500 dollars and a quantity of provisions, as overseer of the defendant's plantation, having been discharged, before his term of service expired.—He had judgment and they appealed.

1st. Their counsel urges the court erred in refusing, on their motion, to dismiss the plaintiff's action, showing his time of service had not expired, and, consequently, nothing was, as yet due him, and he was premature in bringing his action.

2. In allowing evidence to be given of the provisions, as none was stated in the petition.

3. In allowing the letter of the defendant, Erwin, which contained no contract, but a mere pollicitation, to be read.

4. In rejecting the defendant's answer to an interrogatory in the petition, because it had

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not been inserted in the answer to the petition.

I. The petition states, the money and provisions to have been promised absolutely, without the mention of any time of payment or delivery. The plaintiff might therefore, well contend that they were due immediately, and might show by evidence that this was the case. The provisions being stated to consist, among other things, of so much meal as might be sufficient for his family during the time of his service. The allegation must be understood to refer to a delivery before the end of that period.

II. The plaintiff claims those provisions in kind, or their value in money. It would have been clerical to state, what that value is, but the neglect of doing so, does not appear to us, to preclude the plaintiff from offering testimony, to fix this value.

III. A pollicitation becomes often the basis of the contract. It requires, in order to be ripened into a perfect contract, the acceptance of the party to whom it is made. In the present case, the plaintiff showed he accepted the terms offered him, by assuming the charge of the defendants' plantation. As the terms of payment were contained in the letter, it was correctly admitted in evidence.

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IV. Nothing requires that the answer to the plaintiff's interrogatories should be inserted in the defendant's answer to the petition. Unnecessary delay might often be the consequence, if the answer to the petition was necessarily to be delayed till the interrogatories could be answered.

In the present case, the answer was filed before the trial. The court erred in rejecting it.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and the verdict set aside, and the cause remanded, with instructions to the judge to proceed thereon, as if no trial had been had and to suffer the answer of the defendant, Erwin, to the plaintiff's interrogatory to be read—the costs of the appeal to be borne by the plaintiff and appellee.

*Hennen* for the plaintiff, *Preston* for the defendants.

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*KING'S CURATOR* vs. *OSBORNE & AL.*

APPEAL from the court of the first district.

If notes are placed in a man's hands for collection and to secure him for advances

MARTIN, J. delivered the opinion of the court. The plaintiff claims sundry notes, en-

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made and to be made, he may resist a demand of them till he be indemnified.

dorsed and delivered to the defendants for collection, and to secure the payment of advances made, and to be made by them, for his benefit. The defendants resisted the claim on the ground, that they were the owners of the notes, and were accountable, only, for the surplus, in the defendants' hands, after the amount was collected.

It is shown that the defendants applied for letters of curatorship on the deceased's estate, and in a schedule filed, under oath, in the court of probates, put down those notes as the property of the estate.

It is urged, by the plaintiff that the defendants are only pledgees of the notes, and the contract of pledge does not give them any right against third persons, unless a notarial act intervenes.

The defendants contend, that they are the owners of the paper; that they *only*, can sue for its amount, until they endorse it over, or their endorsement be stricken out—that they are not pledgees, for they can legally dispose of the thing, and are only bound to account for the surplus—that they need not procure the sale of the thing to enforce their payment.

We are of opinion, the judgment of the district court was correctly given for the defend-

ants. They have a qualified property in the paper, and may transfer or reduce it into money, and are only bound to account for the balance: at least, they hold in trust, till they are fully reimbursed their advances, and secured for any engagement they have taken on the faith of being compensated out of the proceeds of the sales.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

*Carleton* for the plaintiff, *Morse* for the defendants.

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*MOORE* vs. *MAXWELL & AL.*

APPEAL from the court of the third district.

No bill of exception lies to a final judgment.

The payee of a note who has endorsed it, cannot maintain any action on it, even for the use of his endorsee.

PORTER, J. delivered the opinion of the court. The petitioner, who is the payee of the promissory note on which this suit is brought, alleges that he sues for the use of N. Cox, to whom the note was regularly transferred in course of trade, before it became due.

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The answer contains a general denial of all the allegations in the petition. There is no statement of facts, or any thing equivalent thereto: but, on the trial of the cause, a bill of exceptions was taken to the opinion of the court, on a motion of the defendants, that the judgment of nonsuit should be given against the plaintiff, and in the bill of exceptions it is stated, that the plaintiff had proved the handwriting of the drawer, and adduced no other testimony.

The question, as to the propriety of taking bills of exceptions to final judgments, has frequently come under our consideration, and the court has uniformly expressed an opinion that it could not be done. That the only way in which the final decision of inferior tribunals, on the merits, could be examined, and reversed or affirmed, was by bringing the facts before us, in some one of the modes specially pointed out by statute for that purpose. In the present instance, the bill of exceptions is not taken to the final judgment actually rendered, but the opinion of the court in refusing to give another in lieu of it. It is difficult, if not impossible to distinguish between these cases. The application of the defendants, although

made by motion, was nothing more or less than a demand that the court should pronounce that judgment on the merits which the evidence taken warranted; and the complaint is, that an erroneous conclusion was drawn from the whole testimony given on the trial; that the judge conceived, it did not authorise a judgment of nonsuit in favor of the defendants, but a judgment against them in favor of the plaintiff, and that there was error in his doing so. Such an error we can only examine in a case where the evidence is placed before us in the manner pointed out by law for the revision of final judgments. Bills of exceptions, according to our statute, lie only to the opinion of the court on some question of law arising in the course of the trial; not to the conclusions drawn from the whole evidence and the judgment pronounced thereon. See the cases of *Bujac & al.* vs. *Mayhew*, 3 *Martin*, 613; *Tagert* vs. *David*, 4 *ib.* 1; *Deverny's heirs* vs. *Lafon*, *ib.* 90; *Shewell* vs. *Stone*, 12 *ib.* 386.

But the defendants have assigned errors on the face of the record, and in looking into them we see one that is fatal. This action was commenced by the payee of the note, who, before suit was brought, had parted with all

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interest in it, and by endorsement, transferred the legal title to another. This circumstance, in our opinion, deprived the plaintiff of the right of bringing this action, and distinguishes this case in a material point from those decided in this state, and in our sister states, where this form of proceeding has been resorted to. In all of them, the right has been recognised, because the legal title to the instrument sued on, being vested in the nominal plaintiff, as he had a right to demand the money for himself, he could of course institute any other person to receive it. That such has been the principle on which these actions have been maintained, will appear manifest, if we suppose the case of a person, not a party to the bill, nor appearing to have any interest in it, suing for the use of another. Such an action could not be supported, for as the plaintiff could not sue for himself, he could not sue for a third party. To come still nearer the case now before us, we have next to inquire in what does the situation of a person *who has parted with his interest in the bill*, differ from him *who never had any*. In no material circumstance, as far we can discover. Neither could recover the money for himself, and without an authority to do so,

they have none to receive for another. In the present instance, were it not for a particular allegation in the petition, which will be hereafter noticed, it might be seriously questioned, whether the payee, having written his name in blank, on a note which he retained in possession, was such a transfer of his interest in it, as would prevent him from suing and recovering. But we are precluded from giving the plaintiff the benefit of that consideration, by an averment which he himself has made in the pleadings, that previous to the commencement of the action he had duly transferred the note to the person for whose use the suit was brought. The instrument annexed to the petition and made a part of it, supports this allegation; for, it shows his endorsement. The legal interest had therefore completely passed out of him before the action was instituted.

It has occurred to us worthy of inquiry, whether the suit, being brought for the use of the person in whom both the legal and equitable title to the note was vested, did not cure the defect; but, strongly as we feel inclined to support the proceedings, we cannot do so even on this ground. Nothing on this record

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shows, that Cox ever authorised or sanctioned this suit. Judgment in it would not furnish the defendants with the plea of *res judicata*, if sued again by the endorsee. It is impossible to distinguish between permitting the plaintiff, who had parted with his interest, to bring the action, or allowing any other man in the community, who had nothing to do with the transaction to originate the proceedings, and it is clear that in sanctioning the principle on which this judgment was rendered, we would, in fact, be establishing the right of third parties to institute suits at law, to enforce obligations in which they had no concern.

This petition was, no doubt, drawn from analogy to the mode pursued to this day in countries governed by common law, and formerly in the civil, by the assignees of choses in action, to receive the debts transferred them. According to both systems, the sale or transfer of such objects was illegal; consequently, no other but the person to whom the debt was originally payable could receive it. In the former they adopted a method of getting round the objection, and at the same time securing the right of the transferee, by permitting the assignor to sue for his use, and the court of equity

at a very early period, and the courts of law ultimately, took notice of the assignment, so as to protect the right of the person in whom the equitable interest was vested. In the latter system, the difficulty was avoided by the vendor or transferor constituting the assignee his attorney, *procurator in rem suam*, and stipulating that the action should be brought in the name of the former, for the benefit, but at the expense of the latter. The very reason, however, which required this form of action, shows the impossibility of sanctioning the present proceedings. By the law just referred to, there could be no legal transfer of the debt, and the suit was obliged to be brought by the person in whom the legal interest was vested. Here the instrument was negotiable, had been negotiated, and the right, title and interest were by law vested in another. The assignor had therefore lost the quality, which, under the system referred to, alone gave him a right to sue. We have given the case considerable attention, and we have no doubt, the true inquiry to make in cases of this kind is, has the plaintiff the legal title? Can he sue for himself? If he cannot, then he cannot sue for another. 2 *Black. Com.* 442; *Pothier, Traité de Vente, n.* 550, 554.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be a judgment of this court for defendants, with costs in both courts.

*Strawbridge* for the plaintiff, *Watts & Lobdell* for the defendants.

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*HARRIS vs. ARMSTRONG & AL.*

From the sole circumstance of the claimant's being in the defendant's service, it cannot be inferred that the property attached belonged to the latter and not to the former

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This action was commenced by attachment, levied on a quantity of western produce which the claimant, Lewis, alleges to be his property. The district court, after hearing the evidence, sustained this application, and the petitioner appealed.

The case presents no question of law, and but a single one of fact. We have examined the evidence, and think it supports the conclusion which the judge below drew from it. A witness swears positively that the property attached was shipped on board the steamboat, as belonging to E. Lewis, and marked in his name. The cause, which produced this

irregularity in signing the bill of lading is satisfactorily explained and we cannot, from the sole circumstance of the claimant being in the service of the defendants, infer two facts necessary to make out the defendants case. 1st. that the property did not belong to Lewis, and secondly, that it was owned by Armstrong & Skillhorne.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

*Christy* for the plaintiff, *Strawbridge* for the defendants.

## *FREELAND* vs. *LANFEAR.*

In actions of slander, it is sufficient to prove the substance of the words charged.

But a charge of robbing the plaintiff of his tobacco is not supported by evidence of his *dishonestly obtaining* the tobacco.

An amended answer need not be *served*. But an answer to it is essential

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. delivered the opinion of the court. This is an action of defamation. The petition states that the defendant falsely accused the petitioner of having committed robbery, by reason of which he had suffered damages to the amount of $5000.

The answer denied that the defendant was guilty in manner and form as the plaintiff set

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forth. The cause was submitted to a jury, who found a verdict for the petitioner and assessed his damages at $2500. The defendant appealed.

or judgment may be taken by default.

The first question presented is an alleged variance between the allegation and proof. In the petition, the appellant is charged with having spoken these words "you (meaning the the plaintiff) have robbed me of tobacco". On the trial the expressions proved, were, "you have dishonestly taken my tobacco."

There is no rule more familiar than that which requires the *allegata* and *probata* to correspond, nor to which there are fewer exceptions. In the application of it to actions of slander it has been most usually held sufficient to prove the substance of the words spoken, and we think correctly. For. the expressions charged in the petition and those proved on the trial convey the same idea; altho' the words are not precisely the same; there is no variance between the injury alleged and the injury proved: as if, for example, the plaintiff had declared that the defendant had falsely accused him of committing murder, and it came out on trial that the words spoken, were, that he had wilfully administered poison, or that he had lain in wait and killed.

We shall therefore give the plaintiff the benefit of this modification of the rule, in examining whether the averment that the defendant accused him of committing robbery, is supported by evidence that he charged him with having dishonestly taken, or whether, in other words the allegation and proof, be, in substance the same. We are of opinion they are not. It is true, there can be no robbery without a dishonest taking, but there may be, and there frequently is a dishonest taking, without robbery, because there may be a taking without force. Robbery and larceny are not the same crimes, no more than murder and manslaughter are the same offences, and a man may, in many instances, safely and truly charge another as guilty of theft, and yet be wholly unable to support the allegation that he robbed. Evidence therefore that the defendant published the plaintiff was guilty of the lesser of these crimes, does not support an averment that he charged him with the higher, because the latter is not necessarily included in the former, and to admit it, would be introducing the very evils, which the establishment of the rule was intended to avoid. It was impossible not to be struck with the observation

of the counsel, on the ground that his client might have been ready to justify the accusation, which he really made, and that he was precluded from this defence by being charged by the plaintiff with having imputed to him an offence, which could not be supported, and to which no answer could be given but a general denial.

The appellee has, however, contended that the words were not used in the petition, in the technical sense, but in the meaning which belongs to the words according to the opinion of philologists, and the practice of several eminent writers; namely, an unlawful taking. What weight this argument might be entitled to, if the word stood alone in the petition, we need not say; for we find that it is expressly stated in it, that the word is used in its legal signification. To the denial or justification of the charge in that sense, the attention of the defendant was drawn, and the plaintiff cannot now be permitted to vary from it, in order to make his allegation to come down to his proof.

If the case stood on these pleadings alone, we should be strongly inclined to believe that the court below ought, on the application of the defendant, to have directed a nonsuit. But

there are other features in the case which remain to be noticed. The plaintiff, after issue was joined, finding the error into which he had fallen, in setting forth the slanderous words, filed a supplemental or amended petition, in which he declared on them precisely as they were afterwards proved. No notice was taken of this by the appellant, and when the cause came on for trial, and the counsel for the appellee was about to read the document, an objection was taken that it had not been served on the defendant, and could not be offered to the jury—of this opinion was the judge and the plaintiff excepted

Before expressing our opinion, on the law which this point presents for decision, we deem it necessary to clear from around it, irrelevant matter which cannot in any respect affect the question. Such we consider all that was said in relation to the hardship to which the defendant, who was a foreigner, was exposed in consequence of his having left this country the day after the suit was commenced, uninformed of any other charge but that contained in the original petition, instructing his agent and counsel in relation to the accusation made against him, and totally unsuspicious that any

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change would be made in it. If this be a hardship, it is one of his own creating, and we cannot see how he should by his act, be placed in a better situation than one of our own citizens. The hardship would be the other way, if this circumstance were held to affect at all our decision, as to the right of using the amended petition. But it does not. It is a general rule, that jurisdiction once obtained, cannot be divested or impaired by any act of the parties *pendente lite*, and this applies to all the incidents of the cause, as well as the power of the court to render a final judgment. 2 *Wheaton*, 290.

We have now to consider whether it were necessary to have the amended petition served on the defendant. On this subject, our law is silent, and we are therefore under the necessity of resorting to legal analogies as a guide for our decision. The object of service is twofold—to bring the party into court—and to instruct him of the nature of the action. If he appear and answer, service of an amendment to the petition is unnecessary for the first purpose. And it appears to us, equally so for the second, for the defendant being in court, any change made in the pleadings, after per-

mission to that effect, if obtained on due notice to him or his attorneys must be within his knowledge; at least, it is his fault if it is not. We see no more necessity of serving an amended petition, than there is to serve the answer on the plaintiff, or the replication (if the rules of court require one) on the defendant.

In the present instance, the record states that the plaintiff had leave to amend, with the consent of the opposite party; we think therefore, the judge erred in refusing to let the amended petition be read, on the ground that it had not been served on the defendant. Had it been suffered to go to the jury, the words proved, would have corresponded with the averment, and this difficulty, at least, would have been removed. As it was not, we have a verdict rendered on evidence, which the pleadings did not authorise. This in itself is, perhaps, such an irregularity as would require us to remand the cause. But we express no opinion on that point; for there is another objection which cannot be got over. Supposing this amended petition, by being improperly rejected, could be viewed in the same light here as if it had been submitted to the jury, there was no issue joined on it; for the answer to

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the original petition certainly did not apply to the subsequent amendment. The putting the case to the jury, before an answer was filed, or a *contestatio litis* formed in any other way, was illegal—there was nothing for them to try. If the defendant neglected to plead, he should as in a case quite similar, in the late superior court, be quickened by taking a judgment by default. *Austin* vs. *Morgan*, 1 *Martin*, 205.

On the whole, therefore, we are satisfied that the words proved, could not be offered in support of the original allegation—that they could not be given in evidence under the amended petition; for no issue was made up on it for the jury to decide on, and that consequently, the finding was irregular and must be set aside.

We have been pressed to give a judgment of nonsuit, but we do not think the case authorises it. There has been as much fault in the defendant not pleading, as in the plaintiff going to trial on an imperfect issue. We think justice will be best promoted by remanding the cause, to enable the parties to make up the pleadings and have it tried again.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court

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be annulled, avoided and reversed; that the case be remanded, with instructions to the judge to proceed in the same, according to law, and that the appellee pay the costs of the appeal.

*Livermore* for the plaintiff, *Preston* for the defendant.

*FITZ* vs. *CAUCHOIX.*

APPEAL from the court of the first district.

Nothing can be assigned as error apparent on the face of the record, that may be cured by evidence legally introduced.

After suffering judgment by default, the defendant who was legally cited, cannot assign as error apparent, on the record, the want of evidence to establish the facts alledged in the petition.

MATTHEWS, J. delivered the opinion of the court. This suit was brought on a promissory, negotiable note, by the endorsee, against the endorser. The petition contains all necessary allegations of legal demand of payment from the maker of the note, refusing or neglecting on his part to pay, protest and notice to the endorser. The defendant suffered judgment to be taken by default, which was afterwards confirmed by the court below, and he appealed.

There is no regular statement of facts in the case, or bill of exceptions: nor does it appear that any testimony or proof was taken down in writing. There is only a certificate of the district judge, that the record, as it is sent

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up, contains all the matters on which the case was tried, in the first instance. This being the situation of the cause, the counsel for the appellant assigns, as errors apparent on the face of the record: 1st. want of proof of the signature of the defendant as endorser. 2. That there was no demand from the drawer of the note. 3. No proof of notice to the endorser, &c. All these things might have been supplied by testimony, and we have repeatedly determined that matter, which may have been shewn by evidence in the court below, does not form legal ground for an assignment of errors apparent on the record of proceedings, when a cause is not aided by a statement of facts, &c. But should it be admitted that the certificate of the judge in the present case produces, in some measure, the effect of such a statement; still we are of opinion there is no error in the judgment of the district court. Every thing necessary to entitle the plaintiff to recover, is alleged in his petition. These allegations were not denied by the defendant. After being duly cited to appear in court, he made default and the court below was correct in considering the facts, alleged by the petitioner as confessed. The demand being liquidated

required no testimonial proof to establish its true amount. The judgment obtained thereon by default, would have become final by a sufficient lapse of time, without any further interferance of the court. *Acts of* 1805.

Upon the whole, we are of opinion that this appeal is frivolous and taken for delay only.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs; and it is further ordered, adjudged and decreed, that in addition to said judgment, the plaintiff and appellee do recover ten per cent on the amount thereof, as damages for this frivolous appeal.

*Preston* for the plaintiff, *Seghers* for the defendant.

*BOWMAN* vs. *FLOWERS.*

APPEAL from the court of the third district.

The certificate of a commissioner that a deposition was taken in his presence, is evidence that every thing which appears on the face of it

PORTER, J. delivered the opinion of the court. This action was brought to settle the boundaries of two adjoining tracts of land in the parish of Feliciana, owned by the parties

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in this suit. The plaintiff prayed for a jury which was granted, and a verdict given by them in his favor. A new trial was granted, and the second jury found for the defendant.

On this last trial, a bill of exceptions was taken to the decision of the judge *a quo*, admitting to be read in evidence the depositions of Joseph Book and David Wattman.

The objection to the first was grounded on the witness not having signed the deposition, nor made his ordinary mark to it.

The document, found in the record, which purports to be the testimony of the witness, does appear to have the mark of the deponent affixed to it. The difficulty arises from the form of the commissioner's certificate. It is in these words, "I certify that the foregoing deposition of Joseph Book, after being duly sworn, was taken before me at my office in the parish of Avoyelles, on the 11th day of October, 1823, between the hours of nine and twelve o'clock, the defendant attending in person, and no person appearing for the plaintiff."

We are of opinion that the expression in the certificate "that the *foregoing deposition* was taken in the presence of the magistrate," fur-

was done in his presence.

The party objecting to evidence, must at the trial, state the particular grounds of his opposition.

A service of the interrogatories to be put to a witness, does not dispense with the notice of the time and place of his examination.

The rules of the district court, must be shown to the supreme court, as, any other matter of fact.

In matters emphatically proper to be tried by a jury, the supreme court cannot take on itself to decide the case on other evidence, than that laid before the jury.

nishes evidence that every thing which appears on the face of this deposition was done before him. We have no better proof that all the answers which are there stated, as given to the interrogatories, were really those of the witness, than we have that the ordinary mark of the witness was affixed. Until the name or mark of the person swearing, is placed to the paper, on which his testimony is written, it is not, strictly speaking, his deposition; for the law requires that one or other should be affixed to render it complete. The certificate therefore, referring to the *deposition* being taken before this person commissioned to examine the witness, necessarily conveys the idea, that the mark was affixed in his presence; for without that, there might have been the declaration, or the testimony of the deponent, but there was not his *deposition*. Such is clearly the sense, in which the act of assembly referred to in argument uses the word; for, it merely requires the party taking the testimo- of the witness "to certify that the deposition has been taken in his presence." If this word therefore is not intended to include the signature, the directions would have been, that the commissioner should state that it was sworn

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to and subscribed in his presence. In this instance, the command of the law has been strictly, almost literally pursued, and we are satisfied that the testimony was properly admitted.

In addition to this objection, the counsel for the plaintiff opposed the reading of the testimony, on the ground that it was irrelevant and illegal. What were the particular reasons or facts, on which this general allegation was made, we are uninformed, and if we were, we would not notice them. We have already decided that the party objecting to evidence, must, at the time of trial, state the particular ground, on which he resists its introduction—in the language of the authorities, that he must lay his finger on the objectionable part, in order that his adversary may have an opportunity to see if it is in his power to remove the difficulty. Any other practice would enable one party to lay snares and entrap the other. 10 *Martin*, 637, *Bernard* vs. *Vignaud*.

The deposition of David Wattman was objected to, because no notice of the time and place of taking it, was given to the opposite party, except furnishing the attorney with a copy of the interrogatories, several months be-

fore. This objection, in our opinion, was well taken, and the court erred in permitting the evidence to go to the jury. The right of the party to have the testimony of a witness, residing out of the jurisdiction of the court, examined by commission, is not greater than that of the other, to have notice of the time and place, where this examination is to be made. Such is the general principle, and to the same effect are the express provisions of our statute. Nothing shows that this privilege was waved. And service of interrogatories on the attorney did not cure the defect. The plaintiff had a right to have an opportunity of seeing and hearing the witness, who was to depose against him, and of asking such questions as his answers to the interrogatories might have suggested. 2 *Martin's Dig.* 178, *n.* 16, 194 *n.* 10, *act of* 1817, *p.* 30, 87. *Doane* vs. *Famour.* 9 *Martin*, 222.

The defendant here offered to read a copy of a rule of court, in order to show that the evidence was taken regularly. This rule does not appear in evidence on the record, and we cannot judicially notice it. These particular regulations of the inferior tribunals are not laws, which this court is presumed to know and

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which it must recognise, as soon as presented. Their existence must be proved, and of course proved in the mode pointed out by the law, in the court of the first instance and brought before us, in the same manner that the other evidence in the cause is. *Vol.* 1, *Butler* vs. *De Hart*, 184.

It has been strongly urged on us, that even rejecting this evidence, there is still enough on the record to enable us to affirm the verdict. This position brings directly before us the question, whether, in cases of this kind, which are emphatically proper to be tried by a jury of the vicinage; this court can with propriety take on it to decide the cause on other evidence, than that, o nwhich the jury passed. The weight, which is properly attached to a verdict in such cases seems to forbid us doing so. The plaintiff had a right to demand, and did in fact, pray for a jury in the court below, and he had of course, a right that they should pass on his case on legal evidence alone, so that he might have the benefit, when his cause came here, of that presumption in his favor, which a verdict would have created It follows then, that if the chance to obtain this advantage has been taken from him, by the act

of the opposite party, or the error of the judge, he has a right to have his cause tried again. If, indeed, the evidence appeared to be immaterial, or such as we were clearly satisfied, could not have contributed to influence the minds of those who passed on it, we might, perhaps hold, that it was unnecessary to remand the cause. But the testimony was material and important. It is impossible for us to say, what influence it had on the minds of the jury; we do not know what would have been their verdict without it, and we therefore feel it our duty, to enable the parties to come here, with the benefit of the opinion of the jury, expressed on legal evidence alone. Upon this principle we acted in the case of *Gaillard* vs. *Van Alllen*, reported in 10 *Martin*, 479.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and that this cause be remanded for a new trial, the appellee paying costs of appeal.

*Watts & Lobdell* for the plaintiff, *Woodruff* for the defendant.

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BUTLER *vs.* KENNER & AL.

*BUTLER* vs. *KENNER & AL.*

An executor, who sues on a cause of action that did not exist in his testator, needs not sue as executor.

The bailee cannot oppose to the bailor the right of a third person to the thing bailed.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The petition states, that R. Butler died, possessed of considerable real and personal property, in the states of Louisiana and Mississippi, having appointed the plaintiff and A. L. Duncan, his executors—and his will was proven and letters testamentary accordingly issued, from the court of probates in New Orleans—but the period within which the executors were authorised to act, has long since expired—that the plaintiff proved the will and obtained letters testamentary, in the state of Mississippi, having previously given bond according to law; but A. L. Duncan did not prove the will neither did he act as an executor under it in the state of Mississippi—that, he paid to the devisees of his testator and the heirs of Margaret Butler, the testator's wife, to whom one half of the personal property of his testator in said state was bequeathed, their respective shares of said estate, with the exception of certain bank shares and a quantity of cotton, and has lately transferred to the heirs of Mrs. Farrar 296 shares in the bank of

Mississippi, and disposed of the whole estate according to law, except 91 bales of cotton, and a quantity of it in the seed, which has produced 128 bales, and he afterwards obtained 296 bales, from the crop off the deceased's plantation, in said state: the whole of which cotton, viz. 424 bales, he consigned, for sale, to the defendants, commission merchants in New Orleans, who sold it for $27,611 54, as, by their account of sale, appears.

The petition contains another charge of the same sum, for money received for the plaintiff's use.

It is next averred, that by the defendants' neglect and refusal to pay, the plaintiff is disabled from settling his accounts, with the orphans' court in the state of Mississippi, to pay the remaining debts of the estate, and realising the commission to which he is entitled, whereby he suffers damage to the amount of 10,000 dollars.

There is next a charge for the like sum of $27.611 54 cts. stated as due from the defendants to the plaintiff, on the net proceeds of a quantity of cotton, by him shipped to them, and by them, sold for his account.

The defendants, after a plea in abatement,

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which will be considered, deny that they are indebted to the plaintiff in any other manner than appears by an account, annexed to their answer, and which they aver, contains a true account of all their transactions relative to the estate of the plaintiff's testator, and that they were duly authorised to charge all the items therein charged. They denied that the plaintiff, as executor, made the payments and transfers alleged to have been made, either to the legatees of his testator, or the heirs of Mrs. Butler; but that these payments and transfers were made in pursuance of an agreement referred to. in their answer to the plaintiffs interrogatories—that the proceeds of the 296 bales of coton were disposed of according to the order of the plaintiff's co-executor, and according to the above mentioned agreement.

They answered to the plaintiff's interrogatories that, 1-t. in 1821 they opened an account with the plaintiff, as executor of R. Butler, and continued to correspond with him, up to the time they rendered him the account current, a copy of which is annexed to the petition, viz. Nov. 9, 1822, when they received a letter from him, complaining of a charge of $17,326 76 cts. dated April 9, 1822, mena-

cing them with a suit, unless it was abandoned—that they replied that the estate was charged with that sum, by the direction of his co-executor, and of Harriet Hook, one of the legatees, who was entitled to that sum and more, by the agreement, referred to in the answer, and a consequent partition and settlement, made by the co heirs; sanctioned and approved by the plaintiff, and carried into effect by commissioners, appointed by the heirs, the plaintiff being present and assenting to the partition and settlement, so that the defendants could not withhold from said Harriet, the sum there assigned her.

2. The defendants never received any directions from the plaintiff, as to the manner of keeping said account.

3. They received instructions from him, to keep a separate account of the disbursements of the Woodstock plantation, as appears by his letter, annexed to the answer; and they have no recollection of having ever received any other instructions, relative to the manner of keeping accounts—they never considered the instructions, as placing the funds derived from the Woodstock estate out of the control of A. L. Duncan, his co-executor, and therefore

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felt perfectly safe, in paying over to Harriet Hook, the money in their hands, in the manner set forth in the first of these answers.

4. They kept an account, with the plaintiff, confined to these transactions with him, as executor of R Butler; but no joint account with him and A. L. Duncan, his co-executor. They had no other instruction, as to the mode of keeping this account, than is contained in the third of these answers.

The suit was submitted to the court on the following agreed case.

R. Butler died Oct. 5, 1320, leaving the plaintiff and A. L. Duncan, his executors.

2. On the 9th of Dec. following, Duncan obtained letters testamentary in New Orleans, for the state of Louisiana, only; having never qualified as executor, in the state of Mississippi.

3. The plaintiff obtained letters testamentary, in Louisiana on the 13th of May, 1821.

4. He obtained like letters in the state of Mississippi, on the 25th of June, 1821, and executed the bond required, with sureties for 150,00 dollars, for the faithful discharge of his duties as executor.

5. He afterwards proceeded, on his own in-

dividual responsibility, as executor, in the state of Mississippi, to the inven tory and appraisment and the discharge of his other duties.

6. He made the payments and distribution of the property, evidenced by the receipts annexed, and referred to in his petition. These receipts were duly executed by the persons by whom they purport to be signed, and it is admitted that those who appear to have signed them as agents, were so authorised.

7. The cotton, mentioned in the petition, and for which payment is claimed, grew on the plaintiff's testator's plantation, in the state of Mississippi; it came to the plaintiff's hands and he shipped and consigned it to the defendants.

8. They received and sold it for 27,611 dollars and 54 cents.

9. B. Farrar, B T. Young and Eliza Young, are the heirs of Mrs. Butler, who died in October, 1820.

10. R. Butler devised to his wife one half of his personal estate, in the state of Mississippi.

11. The plaintiff gave the instructions, in his letter to the defendants, referred to in this answer to his interrogatory. He gave them

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no authority to pay to Harriet Hook, or any other legatee, and wrote the letter of Nov. 15, 1822, protesting against the defendants' conduct in regard to the credit given to Harriet Hook, and the consequent debit on his account current.

12. There are several debts of the testator, unpaid in the state of Mississippi, amounting to 2000 dollars; and several claims disallowed by the plaintiff; but for which suit may be brought, amounting to 3000 dollars.

13. The plaintiff has a considerable sum due him for commission, as executor of the estate in the state of Mississippi, and there are not sufficient funds in his hands to discharge the claims and said commission.

14. He was enjoined by the court of chancery of the state of Mississippi from dividing or distributing the estate in his hands, and this injunction was in force at the date of the item complained of.

15. The agreement referred to in the answer, was communicated to the plaintiff before the date of Harriet Hook's receipt, and was acted upon by him, in the distribution of the estate,

16. The plaintiff in May last received let-

ter from judge Dick, stating the outlines of a division of the estate.

17. And Duncan shewed him a copy of the agreement mentioned in that letter.

18. All the estate which came to the hands, or is under the control of the executors, except the balance, arising on the sale of cotton in the defendants' hands, was, previous to the institution of the present suit, distributed and divided among the heirs and legatees, according to the principles of the agreement referred to. All these distributees are wealthy, and fully able to pay any debt or legacy, remaining unsatisfied.

There was judgment for the defendants, and the plaintiff appealed.

By the agreement relied on by the defendants, a partition of the estate of R. Butler, and M. Butler, is made, and to the payment of a balance due to the heirs of M. Butler, *the proceeds of cotton, and other moneys of the estate*, are affected.

Judge Dick, in his letter to the plaintiff, of May 11, 1822, informs him that a division and transfer of the several portions of the estate has been effected, except the balances in the defendants' hands, and the money due by

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M'Cutcheon, and that he has heard that Mrs. Hook has purchased for 50,000 dollars, M'Cutcheon's part of the Woodstock estate.

The plaintiff argues that the defendants contracted with, and are responsible to him alone; that the agreement of the parties, in regard to the division of the estate, cannot affect or modify his right on the defendants. That if this agreement is to have any effect, it does not suppot the alleged payment to Mrs. Hook, a devisee of R. Butler, as it appropriates the funds in their hands to the payment of the heirs of his widow. The plaintiff is responsible to the devisees and legatees of his testator, for the proceeds of the cotton, and has therefore a right to claim these proceeds from the defendants. Duncan was without authority to instruct; nothing authorises his interference. The defendants having undertaken to act as the plaintiff's agent, and received the cotton from him, cannot dispute his authority, nor withhold an account of the payment of the proceeds from him.

The defendants' first ground of defence, is a technical one, that the plaintiff sues an executor, in the state of Mississippi; and, as such, ought previously have obtained letters testa-

mentary in this state. That he cannot join in the same petition a claim, in right of his testator, with one in his own right.

The plaintiff's cause of action was not one which ever existed in his testator, the suit cannot therefore be said to be brought in the right of the testator. The plaintiff contracted with the defendants, in respect to a quantity of cotton, which is alleged to be a part of the estate; the plaintiff might have avoided mentioning this circumstance; for his possession gave him such a qualified property in the cotton, as warranted his suing for any injury done to that possession, or the breach of any contract relating thereto. *Hunter vs. Postlewhaite*, 10 *Martin*, 456.

It is next insisted that the plaintiff, by his own testimony, being an agent only for the devisees and legatees of his testator, must be bound by, and cannot alter any disposition of the property, which these, his principals, have made. An executor is not the agent of the devisees or legatees. To what use would his interposition be, if the devisees or legatees could at once command their respective devises or legacies, maugre the executor? It is from his hands they ought to be received, the things so

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devised and bequeathed are not to be arrested in the hands of his agents, and disposed of eo invito. The counsel has shown that the bailee cannot withhold the thing bailed, although it be not the property of the bailor. *Pothier, Mandat, n.* 62. Surely, the rights of the alleged owner, a third party, cannot be examined, because they cannot be affected by a suit in which he neither appears, nor is cited.

The defendants contend farther, that, admitting they were once accountable to the plaintiff, they are no longer so, because:

1. The property has been divided and apportioned by the heirs, devisees and legatess, to which Duncan expressly, and the plaintiff implicitly, assented.

2. The money paid to Harriet Hook was directed to be paid her by Duncan, who *ad hoc* was still an executor.

3. By a subsequent amicable agreement, the property was, with the express assent of the plaintiff, divided among the devisees and legatees, whereby the legal title vested in these devisees, and the defendants became thereby bound, on notice, to dispose of the funds in their hands accordingly.

It is admitted that Duncan's year of executorship had expired, and that his power resulting from the letters testamentary granted him by the court of probates of the parish of Orleans, (without which he could exercise no power under the will,) in Louisiana, had expired: and it is admitted that in the state of Mississippi, executors must, before acting, give surety and procure letters, which Duncan never did. The defendants cannot, in our opinion, derive any help from Duncan's act.

The plaintiff appears to have been satisfied with the mode of dividing the property, which the parties interested had agreed upon, and acted in pursuance thereto. But his lien or right of holding any part of the estate, of which he did not deprive himself, does not appear to have been thereby affected. The proceeds of the cotton were always in his hands, although in the possession and custody of his agents, an unappropriated *residuum*, after the heirs of M Butler were paid without receiving any part of it.

It is further held that the cotton was not a part of the testator's estate, but was the individual property of his devisees, or the heirs of his wife.

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This is re-producing an objection which has already been disposed of, when we concluded that the bailee could not oppose to the bailor, the right of another to the thing bailed.

The case agreed shows that the cotton, the value of which is claimed, came to the plaintiff's hands, as executor of R. Butler, in his administration of his testator's estate, that he shipped it to the defendants, with orders to sell it for him.

Whether the cotton made really a part of the estate or not, appears to us unnecessary to determine. If it was, the plaintiff, by taking it, and causing it to be sold, made it assets in his hands, and is accountable for the proceeds. The creditors or legatees of his testator, must establish their claims, upon any part of their proceeds, contradictorily with him, and cannot stop these proceeds in the hands of his agents: as the co-executor is not chargeable with the assets that came to his hands, and cannot give any directions as to the disposition of the proceeds.

If the cotton be no part of the estate, then neither Duncan as co-executor, nor the devisees and legatees of R. Butler, nor the heirs of M. Butler, can be considered as having agreed

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to any disposition of it, for the division of the plaintiff's testator's estate was all they had in view.

We do not discover any thing in the case authorising the conclusion that the plaintiff consented to the payment, which he now contests, and the court erred in allowing it.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed, and that the plaintiff recover from the defendants the sum of twenty-seven thousand six hundred and eleven dollars and fifty-four cents, with interest from the inception of the suit till paid, with costs in both courts.

*Hennen* for the plaintiff, *Grymes* for the defendants.

*M'DONOUGH vs. JOHNSON'S EX'RS.*

Appeal from the court of the first district.

An executor is not liable, in the district court, for a debt of his testator.

The defendants have appealed from the judgment of the district court, in which the

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plaintiff has recovered a debt alleged, and there proved to be due from the testator.

It is clear the plaintiff and appellee mistook the tribunal in which his claim must be exclusively inforced. Executors must, in the payment of debts of the succession, proceed in the manner prescribed to curator of absent heirs and vacant successors. *Civil Code*, 276, *art.* 174. The court of probates is the tribunal before which claims against the testator's estate must be established. Other courts are, as to such claims, without jurisdiction.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed, and that the plaintiff's action be dismissed, he paying costs in both courts.

*Porter* for the plaintiff, *Smith* for the defendants.

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APPEAL from the court of the third district.

Proof of the line in dispute being the real line of the younger tract, (purporting to be bounded by the older) is strong presumptive evidence of its being also the boundary line of the former.

MATTHEWS, J. delivered the opinion of the court. In this case the defendant is charged with having trespassed on the land of the plaintiffs, and that he still holds possession hereof, contrary to their right and title to the property in dispute. From the prayer of the petition the principal object of the suit seems to be, to have the title of the parties settled, and possession decreed to the plaintiffs according to the limits of the grant or concession under which they claim. To this effect judgment was rendered in the court below, from which the defendant appealed.

The cause presents no legal question of difficulty; but depends for its decision solely on matters of fact; among which one only appears to be disputed, i. e. the locality or true situation of the north east corner of the tract of land owned and claimed by the plaintiffs. This corner, and a line drawn from it, south to a proper distance, form a common boundary between the contending parties, being the eastern limit of the plaintiffs, and the western of the defendant's tract of land. To

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establish its real position was a burthen incumbent on the appellees. This we are of opinion they have done, by sufficient evidence. The testimony in the case shows clearly the situation of the south west and north west corners of the plaintiffs' tract; but a line run eastwardly from the latter point, the distance required to give the quantity of land called for, by their survey and grant, would not reach the hickory corner for which they contend as the north-east limit. It was therefore necessary to establish the true position of this point by testimonial proof. For this purpose we have the positive and unimpeached testimony of one witness, to whom the tree marked as a corner had been shown by one of the chain carriers, who had assisted in surveying the land for the grantee, but was dead at the trial of this suit.

The record also exhibits proof that the same tree was the known and established limit of the survey and grant under which the defendant claims title.

Further, it is agreed that the full quantity called for by this grant is embraced within the limits of this survey, without extending it to the westward of the place where the hickory once stood as a corner common to both the tracts, of

plaintiffs and defendants, on their northern limits; but being destroyed by time or accident, a white oak near the same spot has been substituted and marked in its stead. The whole evidence of the cause shows most clearly that this point is the limit of the defendant's land to the west, or that it has always been considered as such. The plaintiffs claim under the oldest grant and survey, and the original concession under which the appellant claims title, calls to bound westwardly on said survey and grant.

Now if both surveys had been correctly made, the tree which separates them must be held in common, and proof of its position in relation to either grant would cause it to produce effect on the other; surveyors, like all other public officers, are presumed to do their duty until the contrary be shewn; and there is no evidence in the present case that the persons who made the surveys and plats now under discussion, did any thing to the injury of either of the parties litigant; therefore proof of the limit in dispute being the real line of the younger grant is evidence of its being also the boundary of the elder. But admitting it not to be positive and incontrovertible, it is strong-

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ly corroborative of the oral testimony which appears in support of the same fact.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

*Woodruff* for the plaintiffs, *Watts & Lobdell* for the defendants.

*KILGOUR* vs. *RATCLIFF'S HEIRS.*

A power to institute a suit and carry it on to final judgment does not include that of making a compromise, nor that of receiving the money due.

The decree of a court of competent jurisdiction cannot be examined collaterally, by the parties or those claiming under them.

The receipt of a part of an estate, received by the agent, is not evidence of an intention to ratify or compromise, by

APPEAL from the court of the third district.

PORTER, J. delivered the opinion of the court. The plaintiff as assignee of Margaret Hall sues to recover the one half of the property adjudged to her in a suit which was carried on and prosecuted to judgment by the heirs of Hamilton Pollock, deceased, against the present defendants.

For a correct understanding of this case it is necessary to take a review of the grounds on which that action was brought, the manner in which it was commenced, the circumstances which attended its prosecution, and to narrate the proceedings which followed the rendition of the judgment.

Hamilton Pollock, the ancestor of the person under whom the present plaintiff claims, finding himself in embarrassed circumstances, and apprehensive of being sued by his creditors, made a simulated sale of all his property to William Ratcliff, the ancestor of the present defendants. Before this sale was revoked or annulled, both the parties to it died. Pollock leaving as his heirs Hamilton Pollock junior, and Margaret Pollock, the latter at the time of her uncle's death being married to David Hall. Ratcliff's representatives were his widow and children, who are the present defendants.

which he abandons any part of it.

The heirs of Pollock having determined to bring an action to rescind the conveyance made by their ancestor to Ratcliff, Margaret Hall, and her husband David Hall, who were then residing in the parish of Rapides, authorised Hamilton Pollock junior, the brother and co-heir of Margaret, to institute a suit against the heirs of Ratcliff, in order to have the sale made by their ancestor annulled. An action was accordingly brought in their joint names, and judgment obtained in the district court of the parish of Feliciana, from which judgment an appeal was taken. But before it was carried

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up to this court a compromise took place between the defendants and Hamilton Pollock, by which it was agreed he should abandon part of the property recovered—that is to say, 24 bales of cotton, and that the other objects specified in the decree should be received in discharge of it. And on his receipt being produced in court, acknowledging this agreement to have been carried into effect, the attorneys in the cause consented to have satisfaction entered on the judgment they had obtained against the defendants.

The plaintiffs claim by assignment all the right, title, and interest, which Margaret Hall had in this judgment; and they aver that Hamilton Pollock had no authority to make any compromise of the right of the person they claim under, nor to receive the portion which she was entitled to under the judgment, that the delivery by the defendants of the property received was made in their own wrong, and is, as to the party whom they represent, void and of no effect.

To complete the history of the case it is important to state that subsequent to the judgment and compromise already mentioned, Hamilton Pollock, who had got into his pos-

session as already stated, the property belonging to the succession of his uncle, of which his co-heir Margaret Hall was joint proprietor, on the 4th of August 1820, filed a petition in the court of probates of the parish of Feliciana, where this ancestor had died, praying that his sister Margaret, and her husband, who were residents of the parish of Rapides, should be cited according to law to show cause, if any they had, why the succession should not be liquidated, the debts paid, and a partition of the property directed.

A copy of the petition, and the citation which issued in conformity with it, were served by „ leaving copies at the last place of abode of the defendants"; and on their not appearing, judgment by default was rendered against them on the 20th of November.

On the 30th of December then next ensuing, the plaintiff presented another petition to the probate court, in which he stated that he was a creditor of Margaret Hall, an absentee, and prayed letters of curatorship. Upon which petition the court decreed; that it appearing, to its satisfaction, that the said Margaret was an absentee, it was ordered that the petitioner should be appointed curator on his giving bond

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and security according to law. After this appointment, on the 18th of January, a decree of partition was ordered by the court, an attorney having been previously nominated to the absent heir. In the division made, in pursuance to this order, the amount stated to be coming to each, is eleven hundred and sixty-eight dollars.

The defendants pleaded several exceptions to the action, which must be disposed of, before we can reach the merits.

The *first* is, that an assignee cannot sue in his own name, unless for a debt which is negotiable. There is no ground whatever for this distinction. The sale of such a thing is expressly recognized by our code, and whenever the law permits a man to acquire a title, it allows him to enforce that title in a court of justice.

The *second* is, that the christian names of Ferguson and Ritch, for whose use the suit is brought, are not stated in the petition. This defect, if it be one, we think cured by the plaintiff Kilgour, who sues for their benefit, having given his name at full length.

The *third* exception, which assumes as a fatal defect in the plaintiff's title, that he claims the benefit of a judgment rendered in 1820,

by virtue of a transfer made in 1817, we consider as equally untenable. The petition states that the right of Margaret Hall to the succession of her uncle was purchased in 1817. This sale was certainly not invalidated by the amount of the succession being subsequently liquidated by a judgment; it was changing the evidence by which the amount of the estate could be ascertained, but it was still not less the succession sold: and the buyer had as much right to claim the benefit of any higher evidence, which his vendor might afterwards acquire, as he would have had to demand any other accession, which the property received after he bought it.

The *fourth* exception is equally unfounded; the judgment, which the present parties claim the benefit of, had satisfaction entered on it, and the proper way to have this bar to their recovery removed was by bringing suit. The defendants in the original action were out of court, and the only mode of bringing them in, was by an action in the ordinary way.

The main questions in this cause are first, the effect of the compromise of the original suit by Hamilton Pollock and the delivery of the property to him. And secondly, supposing

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his acts to have been irregular, and without proper authority, whether the subsequent proceedings in the court of probates rendered them valid.

On the first, we find nothing in the evidence, which shows that Hamilton Pollock was authorised to do any thing more for his sister than bring suit and carry it on to final judgment. Such authority to an agent does not authorise him to enter into a compromise. Our law contains an express clause, that the power to have that effect must be special. *Civil Code*, 422, *art.* 10. Such also, according to the same authority, must be the letter which will empower the attorney to make a transaction of any matters in litigation. The agreement therefore by which Hamilton Pollock consented to abandon twenty-four bales of cotton on having the other property given up to him, even though fairly done for the purpose of preventing further litigation in the appellate court, was, so far as it affected his sister, null and void.

We have next to consider the effect of the delivery of part of the property confirmed in the judgment. Whether this were good against Margaret Pollock will be best disco-

vered by considering his right as co-plaintiff, and his authority as agent.

In the first character, he had no power to receive it. He was only creditor for the portion that was due to himself, and had no control over that part which belonged to another. Nor was his authority at all increased by the circumstance that some of the objects received were not susceptible of a corporeal division. The law in this case more attentive to the heir who is absent, than him who is present, forbids the debtor to pay or deliver, unless all having an interest in the thing are prepared to receive it. *Civil Code*, 282, *art.* 120, 288, *art.* 189. *Toullier, Droit Civil, liv.* 3, *tit.* 3, *chap.* 4, *no.* 775.

In the second, we are of opinion that he was equally without authority. The power conferred on him was only to sue, and the 7 *law of the* 14 *title of the* 5 *Partida* expressly declares, that an agent with this power cannot legally receive the amount recovered by the judgment.

The approbation of the attorneys at law by this arrangement, and the satisfaction entered or received with their approbation, has been urged as conclusive on the right of the plain-

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tiff. In deciding on this point, we have not found it necessary to touch on the authority of licensed attorneys to receive the amount recovered by them. On turning to the entry, we find it expressly refers to the compromise made by Hamilton Pollock, and the receipt of the other property received by him, as the grounds of their consent. The legality of this act must therefore depend on this agreement. If it were bad, their approbation cannot make it valid, unless we hold that when they are employed to prosecute a claim, they are empowered to abandon any portion of it they may think proper, and release it. But this is an authority, which we are most clear they do not possess, and if we have it not in relation to themselves, it is equally wanting to sanction the acts of others.

This brings us to the second important question in the cause, the effect of the proceedings in the court of probates. The defendants contend that the property delivered by them to Hamilton Pollock has been received by Mar. Hall the sister, under the judgment of partition, and that this partition operates as a ratification of the conduct of Hamilton Pollock. and if not, a complete ratification of the com-

promise made by him, that it is at least a bar, against the recovery of that portion of the property received by her.

We have frequently determined that a decree rendered by a court of competent jurisdiction could not be examined collaterally by the parties to the action, or those claiming under them. That such decision was conclusive, unless set aside on an appeal, or by an action of nullity, if that remedy still exists. In opposition to the application of that doctrine to this case, it has been contended that the whole proceedings were *coram non judice* and void, and that the defendant was not cited. On the first point, we do not think the court was without jurisdiction. It was that of probates of the parish, where the succession was opened by the death of the ancestor, and where his principal property was situated. It had therefore jurisdiction of the settlement and partition of the estate; more particularly if one of the heirs was an absentee. *Dufour* vs. *Camfranc*, 11 *Martin*, 608. *Trepagnier's heirs* vs. *Butler & al.* 12 *ibid* 534. *Bernard* vs. *Vignaud*, *ante*, *vol.* I, 8. *Civil Code*, 158, *art.* 9.

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The want of citation however has been strongly urged as a ground of absolute nullity, even supposing the court to have had the power to take coguizance of the cause. Admitting the want of citation has the effect contended for, the judgment still presents itself in such a shape as requires us to apply to it the rule on which we have so often acted. The defendant is stated to be an absentee, and the judge decreed that being satisfied she was, he appointed her a curator. Now if such were the fact, the appointment was legal, and there were proper parties to the judgment. Whether in truth she were, or were not absent, was a question for the judge who appointed a person to represent her. We have not the evidence before us on which he acted, and if we had, we could not examine it collaterally. We will remark however, that the averment found in the petition of Hamilton Pollock, that his sister was a resident of the parish of Rapides in the month of *August*, is by no means inconsistent with the fact of her being an absentee from the state in *December* following, and the return of the sheriff that he left the citation at her *last*, not her *usual* place of abode, strengthens the conclusion that she had left the state.

In regard therefore to all the things embraced by that judgment, and which were partitioned in consequence of it, we are of opinion the plaintiff cannot recover, but as to property not comprised in it a very different question is presented; namely, whether the receipt of the property amounts to a ratification of the compromise made by Hamilton Pollock, in consequence of which a part of the succession had been abandoned. To give it this effect would, we think, be carrying the principle of implied approbation further than the law will warrant. If the acceptance of the property, and division by the heir, had been inconsistent with the claim for the other portions of the estate, as if the part divided had been received in place of that given up, there would have been more ground to have presumed this acquiescence; but whether the act were ratified or not, the objects sold and partaken made a part of the estate, and had to be divided. The partition therefore of what clearly belonged to the succession cannot be considered as ratifying an abandonment which one of the heirs had made of a part of it; *nemo facile presumitur donare:* and we do not see that there is any good reason why that rule should not receive an appli-

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cation when the surrender of a right is inferred from the acts of the representative, who was interested in giving a sanction to a proceeding in which he had exceeded the authority vested in him. For, although he may be presumed to have had a strong interest, and consequently a great desire to confirm the transaction; this very circumstance furnishes the strongest ground why the effect of his proceedings should be limited to what he has expressly done, or what clearly and necessarily results from the measures to which he resorted: before dismissing this part of the subject it is necessary to notice a receipt found in the record, by which the attorney for the absent heirs acknowledged that the amount stated in the partition, was in full for all claims which the persons he represented had in the succession. In giving such a receipt he exceeded his authority. An attorney, appointed to give validity to an act of partition, has not the power to renounce the right of the absentee to property not divided. His authority is limited to see the partition legally executed, in respect to the matters comprised in it.

In addition to the 24 bales of cotton which the plaintiff shews were illegally abandoned by

Hamilton Pollock, they claim also the difference in value between the amount of the property partitioned in the court of probates, and that recovered by the judgment of the district court; but they have failed in placing that claim on any grounds which enable us to sanction it. The decree of the court was, that the defendants should surrender certain property, or pay a value which the jury in their verdict, and the court afterwards, thought proper to affix to it. It was a compliance with this judgment to surrender the specific objects enumerated, and a division of these objects afterwards, prevents any claim for their value. It would be quite unfair to have both the thing, and the price of it. Neither is the demand for the negro said not to be included in the partition sustained. A reference to the evidence, at page 85 of the record shows, that one of the slaves died after the rendition of the judgment, and subsequent to the delivery by Hamilton Pollock. We are unable to perceive, after a strict examination of the record, that any part of the property received by him was undivided, except the horse and stock of hogs, the right of the plaintiff to which, cannot be distinguished, from the cotton already mentioned.

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The cause was submitted to a jury in the court below, who found a general verdict for the defendants. On what grounds we do not know, perhaps from a feeling that on the merits, the justice and equity of the case were with the defendants, and that the hardship was great, in calling on them to satisfy a judgment, which they had already surrendered property in discharge of. That juries frequently decide from these impressions without testing each particular point in a case by the law that governs it, and distinguishing accordingly, we have no doubt; nor is it perhaps to be regretted that they do, it being one of the benefits of this mode of trial "that the heart often feels what the head cannot explain." Be that as it may, a colder duty devolves on this court: the obligation on us is imperative, not to suffer the law under which the citizen holds his property to be sacrificed to our notions of equity. If this had been a question of damages, fraud, or error, or depending on the weight to be attached to testimony, we should not disturb the verdict. But the facts are clear, the only thing disputed is the law, and so far as it is found to favour the pretensions of either it must have its effect.

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The one half of the value of the cotton and the horse and stock or hogs, appears on reference to the verdict of the jury, and the judgment in the first case, to be eleven hundred and sixty-eight dollars and fifty cents.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed, and proceeding to give such judgment as in our opinion ought to have been given. It is ordered, adjudged, and decreed, that the plaintiff receive of the defendants the sum of eleven hundred and sixty-eight dollars and fifty cents, with costs in both courts.

*Woodruff* for the plaintiff, *Watts & Labdell* for the defendants.

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*CANEZ & AL.* vs. *SCHR. JAMES M'KINLEY & AL.*

APPEAL from the court of the parish of the city of New-Orleans.

Syndics have no right to receive the whole proceeds of a chattel of which their insolvent was a part owner only.

PORTER, J. delivered the opinion of the court. The petitioners commenced this action in the district court, by attachment levied on the schooner James M'Kinley, which they

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averred was the property of Lewis Paimbeuf and F. M'Leod. Paimbeuf having become insolvent the suit was transferred to the parish court, where the proceedings against his creditors were pending.

The vessel attached having been sold under order of the court, the syndics of Paimbeuf took a rule on the sheriff to compel him to pay over to them the proceeds of the sale. No opposition being made by him to the demand, the rule was made absolute.

The plaintiffs, on being informed of this proceeding, moved that the syndics should bring into court the monies received by them under the rule just mentioned. They resisted. and the judge having sustained the application, and decreed accordingly, they appealed.

On the argument in this court the claim of the syndics has been supported on the general principle, that they have a right to all the funds of the estate, in order that they may pay the different debts according to their respective rank.

That of the plaintiff has been urged, on the ground, that one half of the ship attached and sold, belonged to M'Leod, and that consequently the syndics had no right to take into

their possession more than a moiety of the proceeds of the sale; and that even admitting they had a right to the whole, the irregularity committed by them in taking the money out of the sheriff's hands without giving the appellee any notice, vitiates the whole proceedings, and requires of the court to replace the parties in their original situation.

It was certainly irregular for the appellants to have their rule made absolute on the sheriff, without giving notice to those who had an interest in opposing it. But as the parties are now before us, and we are enabled to pronounce on their respective rights, we deem it unnecessary to remand the cause, in order that the very same matters should come before us in another shape. It would be creating delay, and increasing costs, without answering any valuable purpose.

We are of opinion that the syndics had a right to take into their possession, all the property of the insolvent, and of course that they were authorised to demand and receive any monies belonging to his estate. Such are the express commands of the law, and without such a right, it would be impossible to adjust the

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conflicting pretensions of creditors, or make a final settlement of the estate.

But we are also of opinion, that they had no right to take into their possession property, or monies, which did not belong to the bankrupt. In the present case, Paimbeuf and another were alleged to be the joint owners of the vessel. No evidence introduced by either party, impugns or contradicts this statement: on the contary, it is stated in the answer filed by the appellee, that Paimbeuf was only part owner. The syndics therefore, could only claim a part of the proceeds. They had no right to collect money belonging to another, and gratuitously undertake the settlement of his debts. Nor could the plaintiffs, who had a right of action against M'Leod, be compelled to await the settlement of Paimbeuf's estate, before they obtained the benefit of the proceedings against their debtor, who had not failed.

It was contended in argument that the court could not notice this right in M'Leod, because he was not made a party defendant. Admitting this to be true, we do not see what right the appellants have to complain of it, or how their claim is increased by this circumstance.

It may be a question between the plaintiffs and him, but it is surely one with which the appellants have nothing to do. A recurrence however to the petition shews that the original proceeding was *in rem*, and that neither of the owners were made defendants, or cited. It is true the plaintiffs subsequently moved that the syndics of Paimbeuf should be made parties defendants, and it does not appear that any notice was attempted to be given to the other owner, who was an absentee. Whether it was necessary to do so, or not, we need not say, for we are very clear that on this motion, and between these parties, we cannot enter into the regularity of the proceedings against him.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be annulled, avoided, and reversed, and it is further ordered, adjudged, and decreed, that the syndics of Lewis Paimbeuf do pay into the hands of George W. Morgan, sheriff of the parish of Orleans; the one half of the nett proceeds of the schooner James M'Kinley, received by them under an order of the parish court; and it is further ordered, adjudged, and decreed, that the appellees pay the costs of this

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appeal, and the appellants those arising from this application in the court below.

*Grymes* for the plaintiffs, *Seghers* for the defendant.

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*ROSE & AL. vs. BUHLER & AL.*

A district judge cannot be examined as a witness on the trial of a suit, where he sits as judge.

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court. The defendants and appellants in this case, having need of the testimony of the district judge, prayed him to give it. The judge was of opinion that he could not do so, and a bill of exceptions was taken.

We think he did not err—the Spanish law expressly forbids this. *Part.* 3, *tit.* 16, *l.* 19.

There may, however, be a different mode of practice, which, by taking off the reason of the rule, perhaps destroys it in jury cases. If the judge, when he tries the facts, must weigh the evidence, he must do so impartially. This perhaps he cannot be easily supposed to do, when he is to weigh his testimony against that of another. When, however, not he, but a jury, is to try an issue of facts, it would seem the reason in some degree fails. Yet

cogent ones present themselves; in a court composed of one judge only, who is to administer the oath? it cannot be done by any but a member of the court, and he is the only one. He is to determine on his competency—to determine on the absence of evidence, if a nonsuit be prayed.

It seems to us some legislative provision is necessary in a case like this. Otherwise, the party cannot attain his right.

Justice requires that this case be remanded, in order that the defendants may be afforded the means of obtainining the evidence they are in want of.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the case be remanded for further proceedings, as if no trial was had—the costs of this appeal to be borne by the appellees.

*Watts & Lobdell* for the plaintiffs, *Workman* for the defendants.

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BREEDLOVE & AL. vs. YOUNG.

BREEDLOVE & AL. vs. YOUNG.

APPEAL from the court of the first district.

If the plaintiff demand less than three hundred dollars, the case cannot be appealed from, though the defendant offer a set off, which, added to the plaintiff's claim would make an aggregate of more than three hundred dollars, and accounts to a larger amount were investigated, on the trial.

PORTER, J. delivered the opinion of the court. In this action, the balance of an account, averred to be due by the defendant, is stated to be two hundred and eighty-eight dollars and sixty-three cents, and the prayer in the petition is for judgment for that amount. The defendant pleads the general issue, and sets up a reconvention for fifty-six dollars and thirteen cents. The court below were of that opinion, and gave judgment accordingly. The plaintiffs appealed.

We do not think this a case of which this court has jurisdiction. The sum demanded in the petition does not give it. Neither does the amount of the judgment rendered confer it. It is said the account investigated at the trial, shews that transactions to a much larger amount than three hundred dollars were gone into, and that the claim of the defendant, added to that of the plaintiffs, proves that more than three hunded dollars were disputed between the parties. Neither of these circumstances enables us to take cognizance of the case. The claim in the answer, if considered as a com-

pensation, cannot be added to the demand in the petition, for it goes to extinguish it; if viewed as a reconvention, it is in the nature of a new action, and the sum claimed is only fifty-six dollars. The argument drawn from the amount of the matters contested, at the trial, supposes an examination of the merits, which cannot be gone into, unless on the face of the pleadings, the case appears to be one of which we have jurisdiction.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed with costs.

*M'Caleb* for the plaintiffs, *Christy* for the defendant.

*CHALMERS & AL. vs. WHITE & AL.*

APPEAL from the court of the first district.

The laws relating to respites, in force in Louisiana before the adoption of the constitution of the United States by the people there, are not repealed by the article of that instrument,

PORTER, J. delivered the opinion of the court. The defendants plead as an exception to this action, a respite granted them by their creditors. The plaintiffs aver that they did not assent to the proceeding, and are not bound by it.

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which inhibits states from passing certain laws.

We are unable to distinguish this case from that of *Blanque* vs. *Beale's rxecutors*, decided in last July term. The court then came to a conclusion that the ancient laws in force at the time the constitution of the United States was formed, were not repealed by the clause in that instrument, which prohibits states from thereafter passing laws of a similar nature. The subject has been ingeniously argued in the brief submitted by the plaintiffs' counsel, but we see nothing in it to induce a change in the opinion we have already expressed. The question, we understand is now before the supreme court of the United States, and it is unnecessary to agitate it here, until the decision of that tribunal is ascertained.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered that there be judgment against the plaintiffs, as in case of nonsuit, with costs of both courts.

*M'Caleb* for the plaintiffs, *Workman* for the defendants.